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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GARY W. JUSTICE,

Petitioner,

v.

JOHN W. DENNIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REASONS WHY WRIT OF CERTIORARI IS NOT APPROPRIATE IN THIS CASE

Summary of the Respondent's Arguments

I. There is no conflict between the Fourth Circuit's *en banc* opinion and other circuits' decisions involving the appropriate standard in a § 1983 excessive force claim based on a fifth amendment violation. In determining whether an officer's conduct was unreasonable all circuits consider whether the officer exceeded the limits of privileged force. One of the factors which a jury considers includes whether the force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

The terms "malice" and/or "shocks the conscience" are appropriate factors to consider in determining whether an officer has exceeded the privileged use of force. The fourth

circuit approved those terms as factors to consider and not a necessary element as the petitioner contends.

II. The petitioner for the first time contends "malice", "sadism", and "shocks the conscience" are unconstitutionally vague. These terms have been used by this Court and every circuit court in the country. The petitioner has failed to raise a substantial federal question.

III. The opinion below is consistent with this Court's decisions that a jury must determine if the level of force used was so unreasonable as to exceed the privilege accorded agents of the state. The petitioner suggests a federal jury should find liability based on mere negligence. That is inconsistent with the purpose of 42 U.S.C. § 1983 and cases decided by this Court.

ARGUMENT

I. THERE IS NO DIRECT CONFLICT BETWEEN THE CIRCUITS CONCERNING WHAT FACTORS ARE APPLIED IN DETERMINING IF THE FORCE USED BY AN OFFICER IS EXCESSIVE.

The petitioner contends the jury instructions given by the trial court were in conflict with legal principles set forth in the Second, Seventh, and Ninth Circuits Court of Appeals decisions.

The respondent contends the jury instructions taken as a whole fairly and adequately stated the pertinent legal principles widely accepted in an unconstitutional excessive force action and are not in conflict with the other circuits.

The instructions of the trial court followed the test set out in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973) (herein referred to as *Johnson* factors). The factors set out in the jury instructions provide a framework to determine whether the constitutional line has been crossed in cases where an individual alleges he was subject to unjustified abuse at the hands of government officials.

The petitioner takes the jury instructions out of context and argues the threshold of liability was raised by the Fourth Circuit. This is incorrect.

The relevant jury instructions stated:

> You are instructed as a matter of law that under the Constitution of the United States every citizen has the Constitutional right not to be subjected to unreasonable force upon his person while being arrested by a law enforcement officer, even though such arrest is otherwise made in accordance with due process of law.
>
> * * * * *
>
> Whether or not the force used in making an arrest was unnecessary, unreasonable or violent is an issue to be determined in the light of all of the surrounding circumstances, on the basis of that degree of force a reasonable and prudent officer would have applied in effecting the arrest under the circumstances disclosed in this case.
>
> * * * * *
>
> Members of the jury, you are instructed to use the following standard for determining the amount of force necessary to make the defendant liable.
>
> The force used by the officer is unconstitutionally excessive if the officer used a means so brutal, demeaning and harmful as literally to shock the conscience of a court.
>
> You must determine whether the force applied caused injury so severe, was so disproportionate to the need presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Mere negligent use of force although it results in injury does not allow recovery in a case of this type. In order for negligence to be a base [basis] of recovery, the negligence must be so gross as to indicate a complete disregard for the physical integrity or rights of the plaintiff.

* * * * *

So even though you should find from a preponderance of the evidence in the case that the acts alleged by the were in fact knowingly done by the defendant, if you also find that they were done for any one or more of the lawful purposes mentioned, such conduct of the defendant was not beyond the bounds of his lawful authority under state law and so was lawful unless you further find from a preponderance of the evidence in the case that the defendant used more or greater force or means on the plaintiff than would have appeared to a reasonable person in like circumstances to be necessary in order to accomplish the lawful purpose or purposes intended.

* * * * *

In order to make out a claim for damages against the defendant the plaintiff must prove that the defendant acted with such an impermissible motivation or with such disregard for the plaintiff's clearly established Constitutional rights that his action cannot reasonably be characterized as being in good faith.

* * * * *

In determining whether the Constitutional line has been crossed, a court must look to such factors as the need for application of force, the relationship of the need and the amount of force that was used, the

> extent of injury inflicted and whether force was applied in a good faith effort to maintain or restore discipline or maliciously, sadistically, for the very purpose of causing harm.

(App. pp 103-115)

The petitioner argues the trial court instruction required him to prove the use of force was motivated by malice and sadism.

The petitioner's argument has no merit. The Court of Appeals' *en banc* approved applying the *Johnson* factors as a widely accepted method of focusing on the inquiry of whether the patrolman exceeded his bounds of privilege in the use of force. The instructions concerning malice and sadism provide a framework to distinguish whether the force used was applied in a good-faith effort to restore discipline or for the very purpose of causing harm. The jury instructions provided factors to consider in determining whether the force applied was unreasonable in light of the officer's privilege to use force to maintain order and did not mandate any particular finding. Further, the Fourth Circuit rejected the petitioner's contention that the instructions required malice and sadism be found before liability attaches (A-14).

All circuits agree that a jury must distinguish between a privileged use of force by an officer and unreasonable force applied in violation of federal constitutional rights.

In order for a jury to determine whether the privilege has been exceeded, they are given factors to consider. All circuits use the *Johnson* factors. Some circuits, in addition, use "shocks the conscience" as a factor to further clarify whether the force used exceeded the privilege.

A review of the latest cases decided by each circuit indicates there is no direct conflict between them and the Fourth Circuit.

First Circuit

The petitioner contends *Fernandez v. Leonard*, 784 F.2d 1209 (lst Cir. 1986), does not require malice as a factor to be considered by the jury.

The issue in *Fernandez, supra,* was whether the defendants were entitled to summary judgment on the issue of qualified immunity. The Court expressly applied the *Johnson v. Glick test.*[1]

Five months after the *Fernandez* decision, the First Circuit again applied the *Johnson* factors and held the officer's conduct fell short of the "malicious police conduct involved in *Rochin*". *Thompson v. Olson,* 798 F.2d 552, 558 (lst Cir. 1986).

The First Circuit applies the same standards as the Fourth Circuit. Both rely on *Johnson* and *Rochin* to determine if an officer unconstitutionally exceeded the limits of privileged force.

Second Circuit

The petitioner contends the Second Circuit has flatly rejected using malice and sadism as factors in excessive force claims.

In *Fiacco v. City of Rensselaer,* 783 F.2d 319 (2d Cir. 1986), the Second Circuit did not overerule *Johnson v. Glick,* it merely held officers are not entitled to qualified immunity if they intentionally violate a clearly established constitutional right.

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[1]In *Johnson v. Glick* (citation omitted, Judge Friendly wrote a carefully reasoned opinion explaining that the often unidentified due process right to be free of excessive use of force by government officials derived from *Rochin v. California* [342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)], and he reaffirmed that the source of the right was in substantive due process.

Applying Judge Friendly's factors to determine if the constitutional line between a common-law action for assault and battery or wrongful death and a constitutional action for "conduct that shocks the conscience" . . . . Under *Johnson v. Glick* we must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing him harm.
Fernandez, supra, at 1215-16

In a recent case, the Second Circuit applied the *Johnson* factors including those indicative of the officer's state of mind. In *O'Neil v. Krzeminski,* 839 F.2d 9 (2nd Cir. 1988), the Second Circuit emphasized the distinction they made in *Fiacco.*[2] The jury instruction in this case is consistent with the Second Circuit.

Third Circuit

The petitioner cites one case where the Third Circuit discussed "shocks the conscience" but did not address malice. In *Black v. Stephens,* 662 F.2d 181 (3rd Cir. 1981), the defendant argued the evidence was insufficient to show a constitutional violation. The Court merely stated the evidence was sufficient to shock the conscience and never addressed any other factors.

Since the *Black* case, the Third Circuit has specifically adopted the Fourth Circuit's *en banc* opinion in this case. In *Metzger v. Osbeck,* 841 F.2d 518 (3rd Cir. 1988), the court cited the *en banc Justice* opinion and applied the *Johnson* factors and specifically included "whether the force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 520.

The Third Circuit is consistent with the Fourth Circuit's opinion.

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[2]Once it is shown the defendant intended to use force, the plaintiff is entitled, though not required, to prove that the defendant acted "maliciously and sadistically for ther very purpose of causing harm". *Johnson v. Glick* (citation omitted). That state of mind, Judge Friendly observed in *Johnson,* is among the "factors" that a court may consider to determine whether the conduct surpasses a common law battery and rises to the level of a constitutional tort.
Id. at 11, n. 1.

Fifth Circuit

The petitioner acknowledged the Fifth Circuit applies the *Johnson* factors. In *James v. Alfred,* 835 F.2d 605 (5th Cir. 1988), the Fifth Circuit found the permissive level of force is governed by the standard announced in *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). Although *Whitley* dealt with an eighth amendment claim, the court held that the standard for constitutionally excessive force which is beyond qualified immunity, required the same application of the *Johnson* factors.[3]

Sixth Circuit

The petitioner cites one case where the defendant did not claim error in the jury instructions and the Court found there was no plain error. *Waggoner v. Mosti,* 792 F.2d 595 (6th Cir. 1986).

The Sixth Circuit has consistently recognized and applied the *Johnson* factors including the malice and sadism factors.[4]

> The government's interest in effective law enforcement justifies the use of force to subdue and arrest suspects. If police officers were foreclosed from the use of force to effect the arrest of criminal suspects, it is doubtful that any suspect would peaceably submit to arrest. Thus, an officer's authority to apply force when necessary both deters criminals from resisting arrest and permits law enforcement officials to act efficiently in apprehending offenders.

Lewis v. Downs, 774 F.2d 711, 713 (6th Cir. 1985)

The Sixth Circuit decisions are consistent with the Fourth Circuit.

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[3]See also, *Coon v. Ledbetter,* 780 F.2d 1158 (5th Cir. 1986); *Ware v. Reed,* 709 F.2d 345 (5th Cir. 1983); *Shillingford v. Holmes,* 634 F.2d 263 (5th Cir. 1981).

[4]*Webb v. McCullough,* 828 F.2d 1151 (6th Cir. 1987); *Childs v. Pellegrin,* 822 F.2d 1382 (6th Cir. 1987); *Franklin v. Aycock,* 795 F.2d 1253 (6th Cir. 1986).

Seventh Circuit

In *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987), the Seventh Circuit rejected the *Johnson* factors in a fourth amendment case, but not a fifth amendment case such as this one. In *Lester, supra,* the Court specifically noted that the *Johnson* factors were still applicable to pretrial detainee (fifth amendment) cases and cited the *Justice v. Dennis* panel decision.

Even the Seventh Circuit would apply the *Johnson* factors to this case. The Fourth Circuit was aware of the *Lester* decision and refused to distinguish between fourth and fifth amendments when applying qualified immunity to the officer's actions.

Eighth Circuit

The petitioner cites *Davis v. Forrest*, 768 F.2d 257 (8th Cir. 1985) as indicative that the Eighth Circuit does not consider malice as a factor.

The *Davis* opinion specifically applied the four factors in *Johnson,* including malice. The court held that the terms "malice" and "shocks the conscience" are approved in the Eighth Circuit. It recognized those terms are intended to make clear that not every assault and battery by a police officer is a violation of the Constitution.[5]

Since the *Davis decision,* the *Johnson* factors have been upheld by the Eighth Circuit. *Dale v. Janklow*, 828 F.2d 481 (8th Cir. 1987); *Patzner v. Burkett*, 779 F.2d 1363 (8th Cir. 1985).

The Eighth Circuit is consistent with the Fourth Circuit.

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[5]"Davis objects to the first part of the instruction, requiring that the conduct 'shock the conscience,' and to the fourth factor requiring the jury to consider whether the officer acted "maliciously and sadistically". Our court has on no less than three occasions approved the four factors, including the fourth factor to which Davis objects. (Citations omitted)."

Id. at 258

whether substantive due process rights were violated. The Ninth Circuit has applied those factors since 1975 to alleged procedural and substantive constitutional violations. Those factors distinguish between a tort or constitutional violation.[6]

The Ninth Circuit is consistent with the Fourth Circuit.

Tenth Circuit

The Tenth Circuit also applies the *Johnson* factors in cases involving alleged unconstitutionally excessive force. In *Trujillo v. Goodman,* 825 F.2d 1453 (10th Cir. 1987), the Tenth Circuit listed the four factors cited in *Johnson* as the appropriate standard. The constitutional prohibitions against excessive force apply to people in custody and people not yet in custody. *Wise v. Bravo,* 666 F.2d 1328 (10th Cir. 1981).[7]

After listing the *Johnson* factors, the Tenth Circuit stated:

Ninth Circuit

Contrary to the petitioner's argument, the Ninth Circuit applies the *Johnson* factors in excessive force cases to focus on the reasonableness of the officer's action. The Court applies the same factors in a fourth amendment or fourteenth amendment claim. *Smith v. City of Fontana,* 818 F.2d 1411, 1417 (9th Cir. 1987). In *Smith,* the Court specifically listed the *Johnson* factors as necessary to determine

[6]In *Rinker v. City of Napa,* 831 F.2d 829 (9th Cir. 1987), the Ninth Circuit held in light of *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), the jury instruction that lack of due care was sufficient to create liability under § 1983 was erroneous. The Court ordered a new trial with the jury instructed in accordance with *Johnson v. Glick.*

[7]Factors relevant to whether the use of force is excessive are the relationship between the amount of force used and the need presented, the extent of the injury inflicted, and the motives of the state officer. Force inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience, or by malice rather than mere carelessness, may be redressed under § 1983. Such an inquiry is a factual one, depending for its resolution on the totality of the circumstances presented.

Trujillo at 1485.

> . . . . determining when a police officer's conduct violates a person's constitutional rights itself incorporates some intent requirement because it includes an inquiry into the motives of the State officer.

Id. at 1460

The Tenth Circuit is consistent with the Fourth Circuit.

Eleventh Circuit

The Eleventh Circuit also applies the *Johnson* factors in determining if force used was excessive and beyond the qualified privilege provided law enforcement. As the Eleventh Circuit stated in *Gilmere v. City of Alanta*, 774 F.2d 1495 (11th Cir. 1985) (*en banc*)[8],:

> The court below property cited the *Johnson* factors in addressing the plaintiff's substantive due process claim. The blows were not delivered in a good-faith effort to control but rather out of irritation at his initial resistance.

Id. at 1501

Excessive force cases which are alleged constitutional violations are treated the same in the Eleventh Circuit as in the Fourth Circuit.[9]

District of Columbia

Once again, the *Johnson* factors are applied in this circuit.

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[8]*Cert. denied,* ____ U.S. ____, 106 S.Ct. 1970, 90 L.Ed.2d 654 and *cert. denied sub nom. Sampson v. Gilmere,* ____ U.S. ____, 106 S.Ct. 1993, 90 L. Ed.2d 673 (1986).

[9]*See Popham v. City of Kennesaw*, 820 F.2d 1570 (11th Cir. 1987). *Burch v. Apalachee Community Mental Health Services*, 840 F.2d 797 (11th Cir. 1988).

> We regard *Rochin* as entirely consistent with the *Johnson v. Glick* guidelines for determining constitutional limitations on the use of force . . .
>
> . . . The application of force maliciously and sadisticallly, for the very purpose of causing harm, can serve no legitimate government purpose.

Norris v. District of Columbia, 737 F.2d 1148, 1151 (D.C. Cir. 1984); *Malhoyt v. Stover,* 830 F.2d 237 (D.C. Cir. 1987).

SUMMARY

There is not a direct conflict between the Fourth Circuit opinion and the other circuits. The petitioner is attempting to use this case as a vehicle to reduce § 1983 excessive force cases to simple negligence cases. The *Johnson* factors provide workable guidelines for juries to distinguish between a simple tort and a constitutional violation. Juries in the calm, security of the courtroom should not be allowed to second-guess law enforcement officers who are confronted with intoxicated, assaultive individuals. It is only when an officer punishes a citizen out of spite, ill will, or malice that he should be civilly liable. It is obvious the other circuits agree that those factors should be addressed by a jury. The petition should be denied.

II. THE INSTRUCTIONS ARE NOT VAGUE AND THIS ISSUE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION.

The petitioner contends that the use of the terms "shocks the conscience", "malice", or "sadism" are unconstitutionally vague and presents an important federal question.

The issue of the instructions being vague was not raised at the trial or appellate levels. It is being raised for the first time in this petition. Certiorari should not be granted for this reason.

Also, the terms "shocks the conscience", "malice", and "sadism" have been used by this Court and the circuit courts for many years. The general public understands their meaning and

can apply them as easily as the term "unreasonable". This issue does not raise a substantial federal question.

III. THE OPINION BELOW DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The petitioner contends that the opinion below conflicts with this Court's decision concerning the fourth amendment, *Tennessee v. Garner,* 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985)[10] or, in the alternative, this Court's substantive due process decisions concerning the fifth and fourteenth amendments. *Black v. Rutherford,* 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984) and *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).[11] The respondent contends that the instructions violate no opinions of this Court. The instructions focus the jury on the issue of whether the officer, who was authorized to use force, exceeded the bounds permitted.

The instructions given by the trial court did not violate either *Tennessee v. Garner, Bell v. Wolfish,* or *Black v. Rutherford.* The *en banc* and the panel decision both found that the rights involved were fifth and not fourth amendment rights. (A-11, A-59, n.4). The fourth amendment and *Tennessee v. Garner* have no application. Even so, the reasonable standard for using force against a recalcitrant prisoner was used (A-13). What was "reasonable under the circumstances was defined as set forth in *Johnson v. Glick* (A-14).

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[10]It should be noted that the events of this case occurred on December 19, 1982. (A-3) Judgment for the respondent was entered March 7, 1985. (A-84) The *Garner* case was decided March 27, 1985. 471 U.S. 1.

[11]The petitioner's original complaint alleged only that the acts of the respondent "violated rights secured to the plaintiff by the Due Process Clause of the fourteenth amendment." See Complaint, Parg. 1. The first reference to the fourth amendment was on appeal although his request for jury instructions referred to "unreasonable" force (A-8 & 9). The issue of the fifth amendment was first raised in this petition.

Also, the fifth amendment proscriptions were not violated, since the instructions focused the jury's attention on whether the force used was necessary or for the "purpose of causing harm" (A-115). This is consistent with this Court's prior decision.

The petitioner asked for instructions which were a negligence standard of whether the respondent used "any force beyond that reasonably necessary to accomplish his lawful purpose." (A-9). He also advocates a standard of the least restrictive means available. Either standard will superimpose a "font of tort law" upon the federal courts.

Daniels v. Williams, supra.[12]

A decision of this Court specifically addressed this issue. *Whitley v. Albers, supra,* applied the same standard in an eighth amendment context. The lower court properly defined the standard of force whether fourth, fifth, eighth or fourteenth amendment applies, the jury was properly informed of the standard. Whether the force was needed was the focus of the instructions.

To hold that an officer is required to exercise a higher standard of restraint in use of force during a confrontation at or near the scene of the crime than he is at a jail merely because a magistrate has passed upon the issue of probable cause is inappropriate. The opposite is true. Outside the confines of the jail, where the officer confronts a person who may be armed, justifies, if anything, less restraint. Otherwise, for example, an

[12]This is not the case for deciding the question reserved in *Daniels v. Williams, supra.* 474 U.S. at 334, n.3, of whether "reckless" or "gross negligence" can be the basis of liability. The respondent's version of the occurrence (A-3 - A-6) does not involve "reckless" or "negligent" conduct. The petitioner's version differed sharply. He said that he was not drunk, with an alcohol concentration of 0.16, did not resist, was peacefully standing handcuffed when the respondent grabbed him by the throat. It was at this time that a bubble of spit flew from his mouth, floated through the air, landing on the respondent's face. At this time, respondent slammed his face into the wall, maced him while he cowered in the corner of the room, grabbed him in the groin, and threatened him. The jury rejected this version.

officer could not use mace on an arrestee who is struggling prior to taking him before a magistrate. He could, however, once the offender is searched, handcuffed, taken before the magistrate, and then to jail.

These instructions properly focused the attention of the jury on the difference between "privileged" and "non-privileged" force. They are consistent with this Court's opinions.

CONCLUSION

There is no significant conflict in circuits on this issue. The opinion of the lower court appropriately addressed this issue. This petition should be denied.

Respectfully submitted, this the 31st day of May, 1988.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day a copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was served upon the person indicated below by depositing a copy of same in the United States mail, first class postage prepaid, addressed as follows:

James J. Wall
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This the 31st day of May, 1988.

Isaac T. Avery, III
Special Deputy Attorney General